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No. 88-1881

In the Supreme Court of the United States

OCTOBER TERM, 1989

ANTHONY INDELICATO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to prove that petitioner conspired to participate in the conduct of an enterprise through a pattern of racketeering activity.

2. Whether petitioner's racketeering conspiracy conviction was barred by the statute of limitations.

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OPINIONS BELOW

The opinions of the court of appeals affirming petitioner's conviction (Pet. App. 42a-90a) are reported at 868 F.2d 524. The opinion of the en banc court of appeals holding that petitioner's conduct constituted a pattern of racketeering activity (Pet. App. 3a-41a) is reported at 865 F.2d 1370.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1989. A petition for rehearing was denied on March 21, 1989. Pet. App. 91a-92a. The petition for a writ of certiorari was filed on May 19, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of the RICO statute, 18 U.S.C. 1962(c), and of conspiring to violate the RICO statute, in violation of 18 U.S.C. 1962(d). He was sentenced to consecutive terms of 20 years' imprisonment and fined $50,000. The court of appeals affirmed petitioner's conviction on the RICO conspiracy charge but reversed on the substantive RICO charge. Pet. App. 45a-46a.

1. The evidence at trial showed that for decades the "Commission" has been the national ruling body of La Cosa Nostra, or the Mafia, in the United States. The Commission controls and coordinates the criminal activities of Mafia groups known as "families." There are five such families in New York: the Genovese, Gambino, Lucchese, Colombo, and Bonanno families. The head or "boss" of each New York family serves on the Commission. Each family has an underboss and a counselor who also work closely with the Commission to accomplish its unlawful objectives. The criminal business of the Commission is carried out by "soldiers" (formally inducted members of the various families) and "capos" (middle-level members, or captains). Pet. App. 6a-7a, 46a-47a.[1]

The Commission acted to coordinate the criminal activities of La Cosa Nostra, to resolve controversies that arose among various families, and to settle leadership dis-

[1] Six of petitioner's seven co-defendants were either full-fledged members of the Commission (as bosses of the five families) or high-ranking officials who were delegated to sit with the Commission as the representative of or an aide to a particular boss. The seventh co-defendant was a soldier in the Colombo family. Pet. App. 47a.

putes within particular families. The Commission is the sole authority within La Cosa Nostra with the power to order the assassination of the boss of a family.

From the early 1970s to the early 1980s, the Bonanno family was beset by internal factional disputes and was not represented directly on the Commission. In 1979, the Commission ordered the murder of Carmine Galante, the boss of the Bonanno family, and two of Galante's associates, Leonard Coppola and Giuseppe Turano, as a means of realigning the family's leadership in order to resolve these long-simmering disputes. Pet. App. 6a-7a, 46a-47a.[2]

Petitioner, a soldier in the Bonanno family, and fellow Bonanno soldier Dominic Trinchera, among others, carried out the Commission's plan to assassinate Galante and his associates. They prepared for the murders for several months, obtaining a stolen getaway car and a cache of firearms. The man who supplied the weapons testified that Trinchera had boasted that his position in the family would improve after the executions. Pet. App. 7a, 47a, 49a; Gov't En Banc Br. 9-11.

On July 12, 1979, Galante and Turano met for lunch on the rear terrace of a Brooklyn restaurant called Joe & Mary's. About an hour later, two of petitioner's co-conspirators arrived with the third targeted victim, Coppola. Although Coppola initially dined separately from Galante and Turano, he was later invited to join them. Shortly

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[2] The murders of Galante, Turano, and Coppola were charged as three acts of racketeering activity. The indictment also enumerated numerous other racketeering acts, including extortion and labor bribery in the concrete construction industry in New York City, the murders of three other La Cosa Nostra members, a 1981 conspiracy to murder petitioner, and loansharking. Petitioner was not alleged to have participated in any of these other racketeering predicate acts. Pet. App. 8a, 47a-49a.

before 3 p.m., petitioner and three other men arrived in the getaway car. All four wore ski masks and were armed. Petitioner and two of his masked associates entered the restaurant, walked directly to the rear patio, and shot Galante, Turano, and Coppola at point-blank range. The two co-conspirators who had been dining with Coppola joined in the shooting. Pet. App. 7a-8a; Gov't En Banc Br. 11-12.

Petitioner fled in the getaway car. After abandoning the car, petitioner reported directly to the headquarters of the Gambino family underboss, Aniello Dellacroce, who had been monitoring the plans to kill Galante. Outside Dellacroce's headquarters, petitioner was congratulated by the counselor for the Bonanno family. Pet. App. 8a; Gov't En Banc Br. 13-15.

With the Commission's approval, petitioner was promoted to capo in the Bonanno family in 1981. Trinchera was also promoted to the position of capo. Recorded conversations of petitioner's associates showed that petitioner continued his association with the Commission as late as 1984. Pet. App. 8a; Gov't En Banc Br. 17-18.

2. While petitioner's appeal was pending before a panel of the court of appeals, the en banc court considered and rejected his claim that the three murders committed on July 12, 1979, did not constitute a "pattern of racketeering activity" within the meaning of the RICO statute, 18 U.S.C. 1961(5). Pet. App. 3a-41a. The en banc court explained that "proof of two acts of racketeering activity without more does not suffice to establish a RICO pattern"; rather, a pattern requires that the racketeering acts be interrelated and that there be "continuity or a threat of continuity." *Id.* at 28a. Those requirements, the court ruled, can be met even if the predicate racketeering acts are close together in time. *Id.* at 28a-29a. In such a case, "evidence of continuity or the threat of continuity will

simply have to come from facts external to those two acts." *Id.* at 33a. The court observed that "a pattern may be found, for example, in the simultaneous commission of like acts for similar purposes against a number of victims." *Ibid.* The court also noted that a defendant's association with an organized crime group may "help to establish that the defendant's own acts constitute a pattern within the meaning of RICO." *Id.* at 35a.

Applying those standards, the court had "little difficulty in concluding that [petitioner's] participation in the three Bonanno family murders as a representative of the Commission constituted a pattern of racketeering activity within the meaning of RICO." Pet. App. 36a. Three persons were targeted for execution, and the three murders constituted more than one act. The murders were related, in that the purpose of each was to facilitate the change in leadership of the Bonanno crime family. The requisite threat of continuity was also present: "[t]hough the murders themselves were quickly completed, both the nature of the Commission, which was the alleged RICO enterprise, and the criminal nature of the Bonanno family, control of which the murders were designed to achieve, made it clear beyond peradventure that there was a threat of continuing racketeering activity." *Id.* at 36a-37a.[3]

3. After the en banc court rendered its decision, the panel affirmed petitioner's RICO conspiracy conviction. Pet. App. 42a-90a. The court rejected petitioner's argument that the conviction was barred by the five-year

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[3] The court's ruling was unanimous. Judges Oakes wrote a concurring opinion to emphasize that, although this is "the quintessential racketeering case," facts external to the three murders "were essential to prove relatedness and the threat of continuity." Pet. App. 37a. Judge Mahoney also wrote a concurring opinion to note his view that relatedness and continuity are attributes of a RICO enterprise as well as of the required pattern of racketeering activity. *Id.* at 40a-41a.

statute of limitations, 18 U.S.C. 3282. Pet. App. 59a-61a. Following its decision in *United States* v. *Persico*, 832 F.2d 705 (1987), cert. denied, 108 S. Ct. 1995 (1988), the court held that "a RICO conspiracy offense is complete, thus commencing the running of the five-year statute of limitations, only when the purposes of the conspiracy have either been accomplished or abandoned." Pet. App. 60a. For the statute of limitations to be satisfied in this case, the conspiracy must have continued past November 19, 1980 (five years prior to the indictment) and petitioner must have continued as a member of the conspiracy past that date. The court held that both requirements were met: the conspiracy to conduct the affairs of the RICO enterprise (the Commission itself) continued past November 19, 1980, as other members of the conspiracy committed racketeering acts to further the enterprise past that date; and petitioner continued as a member of the conspiracy well into the 1980s. *Id.* at 59a-61a.[4]

ARGUMENT

1. Petitioner seeks review (Pet. 27-40) of the court of appeals' holding that the murders of Galante, Turano, and Coppola at Joe & Mary's restaurant established a pattern

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[4] The panel reversed petitioner's substantive RICO conviction, holding that it was barred by the statute of limitations because petitioner did not commit a predicate act within five years of the indictment. Pet. App. 59a-61a.

Judge Bright would have reversed petitioner's RICO conspiracy conviction as well, because he thought that there was insufficient evidence to tie the three murders to the Commission. Pet. App. 82a, 86a-87a. In addition, Judge Bright explained that, although he concurred in the panel's rejection of petitioner's statute-of-limitations challenge to his RICO conspiracy conviction, he did so only because he was bound by the Second Circuit's decision in *Persico*, which, in his view, is incorrect. Pet. App. 83a, 88a-90a.

of racketeering activity sufficient to support his RICO conspiracy conviction. As a result of this Court's recent decision in *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, No. 87-1252 (June 26, 1989), however, there is no longer a conflict among the circuits on the meaning of "pattern of racketeering activity." Moreover, the court of appeals in this case applied the same standards that this Court adopted in *H.J. Inc.* Petitioner's argument for review, therefore, reduces to his disagreement with the court of appeals' application of the *H.J. Inc.* standards to the facts of this case. But that claim is factbound, and the court of appeals' decision is correct.

This Court held in *H.J. Inc.* that, to form a pattern, the predicate acts of racketeering in a RICO case must be "related" and must "amount to or pose a threat of continued criminal activity." Slip op. 8. Criminal acts are related if they have the "same or similar purposes, results, participants, victims, or methods of commission." *Id.* at 9 (internal quotation marks omitted). Continuity or the threat of continuity is present if the predicate acts "project[ ] into the future with a threat of repetition." *Id.* at 10. In particular, "the threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business," as where "the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes." *Id.* at 11.

For the reasons stated by the court of appeals (Pet. App. 36a-37a), the *H.J. Inc.* standards are met here. The three murders were obviously related: each had the purpose and result of realigning the Bonanno family leadership; the participants were the same; the victims were all associated with Bonanno family boss Galante; and each victim was shot at close range. The three murders also satisfied the requirement of continuity. Although they

occurred almost simultaneously, that fact—which was not a necessary element of petitioner's and the Commission's scheme to kill all three victims—does not diminish the patent threat of continuity inherent in the acts. The murders were attributable to an ongoing criminal entity, the Commission, and they were carried out as part of the regular way in which the Commission did business. Indeed, the executions of Galante, Turano, and Coppola were planned and completed precisely to improve the ability of the Commission to carry on the criminal business of La Cosa Nostra, a business that petitioner, as a soldier and capo in the Bonanno organized crime family, swore he would carry out. *Ibid.* Accordingly, the three murders constituted a pattern of racketeering activity.

2. Petitioner also contends (Pet. 40-51) that his RICO conspiracy conviction was barred by the statute of limitations because the three murders were committed more than five years before the return of the indictment in 1985. That contention is without merit.[5]

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[5] Petitioner does not allege that there is an intercircuit conflict on the statute of limitations question. He does assert (Pet. 46-48) that the courts of appeals have taken differing views on the question whether, to be guilty of RICO conspiracy, each conspirator must agree that he will personally commit at least two predicate acts. That question, however, is not and could not be presented in this petition. Petitioner agreed that he would personally commit, and he personally committed, at least two predicate acts. Moreover, to the extent that the Second Circuit has taken a different position on the question from that of other circuits, the Second Circuit's apparent position is the most favorable towards defendants. In any event, this Court has repeatedly denied certiorari on the same issue. *Scotto* v. *United States*, 109 S. Ct. 1340 (1989); *Finestone* v. *United States*, 108 S. Ct. 338 (1987); *Stewart* v. *United States*, 480 U.S. 919 (1987); *Neapolitan* v. *United States*, 479 U.S. 940 (1986); *Messino* v. *United States*, 479 U.S. 939 (1986); *Adams* v. *United States*, 474 U.S. 971 (1985); *Tillie* v. *United States*, 469 U.S. 845 (1984); *Carter* v. *United States*, 469 U.S. 819 (1984).

The statute of limitations for an offense does not begin to run until the offense is complete. See *Toussie* v. *United States*, 397 U.S. 112, 115 (1970). A RICO conspiracy, like any other conspiracy, continues until its purposes have been fulfilled or it is abandoned. Hence, the limitations period for a particular conspirator does not begin to run until the criminal conspiracy itself can be shown to have stopped or that conspirator withdraws from the conspiracy. *Hyde* v. *United States,* 225 U.S. 347, 369-370 (1912); *United States* v. *Kissel,* 218 U.S. 601, 607-610 (1910); see *Grunewald* v. *United States,* 353 U.S. 391, 397 (1957).

Petitioner does not dispute that the conspiracy in this case continued beyond 1980. Indeed, most of the racketeering acts carried out in furtherance of the conspiracy were committed in the 1980s. See Gov't C.A. Br. 18-35. And although petitioner did not personally commit those additional predicate offenses, the evidence at trial showed that the Commission approved his promotion to capo in the Bonanno family in 1981 and that he continued to associate with the Commission at least until 1984. As the court of appeals concluded (Pet. App. 60a-61a), therefore, petitioner was still a member of a continuing conspiracy less than five years before the indictment was returned. Accordingly, the indictment and conviction were not barred by the statute of limitations. See *United States* v. *Torres Lopez,* 851 F.2d 520, 524-525 (1st Cir. 1988), cert. denied, 109 S. Ct. 1144 (1989); *United States* v. *Persico,* 832 F.2d at 713; *United States* v. *Coia,* 719 F.2d 1120, 1124 (11th Cir. 1983), cert. denied, 466 U.S. 973 (1984).

Petitioner suggests (Pet. 44) that the court of appeals' ruling is inconsistent with the statement in *Bridges* v. *United States,* 346 U.S. 209, 223 (1953), that a "charge of conspiracy to commit a certain substantive offense is not

entitled to a longer statute of limitations than the charge of committing the offense itself." *Id.* at 223. That suggestion is incorrect. The Court in *Bridges* had held that a special provision suspending the running of the statute of limitations applied only to fraud offenses. The government argued that that provision applied to the charge against Bridges of conspiring to defraud the United States. The Court rejected the argument, concluding that the conspiracy charge did not actually allege fraud but instead merely alleged conspiracy to commit certain other, non-fraud offenses that were themselves outside the scope of the suspension provision. Hence, the statement from *Bridges* relied on by petitioner, read in context, means nothing more than that a "charge of conspiracy to commit a certain substantive offense" is not entitled to the limitations suspension if the "the charge of committing the offense itself" is not entitled to the suspension. Nothing in *Bridges* suggests that where, as here, both a conspiracy and a substantive charge are subject to the same limitations provision, the conspiracy and substantive offenses are necessarily completed simultaneously. Indeed, any such suggestion would be contrary to the longstanding principles noted above governing the completion of conspiracies.

Finally, petitioner suggests (Pet. 48-51) that public policy is offended if the statute of limitations for conspiracy does not begin to run until the purposes of the conspiracy have been accomplished or abandoned. That suggestion is both irrelevant and wrong. Conspiracy and substantive offenses traditionally have been treated differently. See *Iannelli* v. *United States,* 420 U.S. 770, 777-779 (1975) (conspiracy poses distinct dangers and can be punished more harshly than the substantive offense). And in this case in particular, petitioner's policy argument has no force, because no statute of limitations would have

applied to the murders committed by petitioner even if they had occurred in 1939. See N.Y. Crim. Proc. Law § 30.10 (McKinney 1981); N.Y. Code Crim. Proc. § 141 (1881). Accordingly, petitioner cannot claim the right to "take advantage of the policy of repose" (Pet. 49) that generally underlies statutes of limitations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

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